HOTEL EQUATORIAL (M) SDN. BHD.

v.

NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS & ANOR.

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH FJ
SYED AGIL BARAKBAH J
[CIVIL APPEAL NO. 85 OF 1983]
24 MARCH 1984

LABOUR LAW: *Appeal - Dismissal of application to refer under s. 33A(1), Industrial Relations Act - Whether dismissal valid - Dismissal by High Court of application for certiorari and mandamus - Whether valid - Proper form of mandamus.*

The Industrial Court made an award under s. 30(1) of the Industrial Relations Act 1967 ("the Act") binding Hotel Equatorial (M) Sdn. Bhd. ("the Hotel") and the National Union of Hotel, Bar & Restaurant Workers ("the Union") and its members. Pursuant to s. 33A(1) of the Act the Hotel applied to the Industrial Court for certain questions of law relating to items (a), (b), (c) and (d) to be referred to the High Court for determination. The application was dismissed. The Hotel applied to the High Court by way of *certiorari* and *mandamus* proceedings in respect of questions (a), (b) and (c). The application relating to questions (b) and (c) was allowed but that relating to question (a) (i), (ii) and (iii) was dismissed. The Hotel appealed.

Held:

[1] The discretion conferred on the Industrial Court under s. 33A(1)of the Act is a limited one and to be exercised with regard to the four paragraphs enumerated in the section.

[2] Such a clause as contained in s. 33B(1) of the Act does not have the effect of ousting the inherent supervisory power of the High Court to quash the decision of the Industrial Court by *certiorari* proceedings if it had acted without or in excess of jurisdiction or had done or failed to do something which rendered its decision a nullity.

[3] Regarding question (a) (i), the decision of the Industrial Court was a nullity. The Industrial Court had misconceived its function under s. 33A(1) of the Act, had failed to consider the question submitted to it and had asked itself the wrong question.

[4] Regarding question (a) (ii) the Industrial Court acted in excess of the limits of its jurisdiction or in the absence of jurisdiction and its decision was a nullity. The Industrial Court purported to adjudicate on the question which it had no power to do under the provisions of s. 33A(1) of the Act.

[5] Regarding question (a) (iii), the decision of the Industrial Court was a nullity. The Industrial Court had not determined the question which it was required to determine under s. 33A(1) of the Act.

[6] The Judge of the High Court had misconceived his duty or function. He purported to substitute his own reason for that of the Industrial Court and this he was not entitled to do. The High Court, in the exercise of its inherent supervisory jurisdiction, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to the law.

[7] The proper form of mandamus would be to direct the Industrial Court to hear and determine question (a) (i), (ii) and (iii) in accordance with the provisions of s. 33A(1) of the Act.

[Appeal allowed with costs. Decision of Industrial Court on question (a) (i) (ii) and (iii) quashed. Decision of High Court on same question set aside.]

Cases referred to:

South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors. [1980] 2 MLJ 165
Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147
Rex v. Shoreditch Assessment Committee, Ex Parte Morgan [1910] 2 KB 859
Board of Education v. Rice [1911] AC 179
Estate & Trust Agencies (1927) Ltd. v. Singapore Improvement Trust [1937] AC 898
Maradana Mosque [1967] 1 AC 13
R. v. Board of Education [1909] 2 KB 1945
Rex v. Nat Bell Liquors Ltd [1922] AC 128
R v. Licensing Justices on Kingston-on-Thames [1901-02] 18 TLR 477

Legislation referred to:

Industrial Relations Act 1967, ss. 30(1), (4), (5), 33A(1), 33B(1)

For the appellant - C.V. Das (Chandran with him) M/s. Shook Lin & Bok
For the 1st respondent - D.P. Xavier; M/s. D.P. Xavier & Co.

JUDGMENT

George Seah FJ:

On 30 January 1982 the Industrial Court made an Award No. 14/82 under s. 30(1) of the Industrial Relations Act 1967 (hereinafter referred to as the Act) binding Hotel Equatorial (M) Sdn. Bhd. (hereinafter called the Hotel) and National Union of Hotel, Bar & Restaurant Workers (hereinafter called the Union) and its members. Pursuant to s. 33A(1) of the Act the Hotel applied for certain questions of law dealing with (a) service charge, (b) outside catering allowance, (c) union notice board & check-off and (d) non-statutory provisions to be referred to the High Court for determination. The application was dismissed by the Industrial Court on 5 May 1982 *vide* Award No. 88/82. The Hotel then took the matter to the High Court by way of *certiorari* and *mandamus* proceedings in respect of questions (a), (b) and (c) only. After hearing legal arguments the learned Judge allowed the application relating to question (b) (i) and (ii) and question (c) (i), (ii) and (iii) but dismissed the application relating to question (a) (i), (ii) and (iii). Hence this application by the Hotel to the Federal Court. There is no cross-appeal by the Union against the decision of the High Court. We will confine this appeal only to question (a) (i), (ii) and (iii) relating to service charge.

Section 33A(1) of the Act reads as follows:

> Where the Court (Industrial) has made an award under s. 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law-
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> (a) which arose in the course of the proceedings;
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> (b) the determination of which by the Court has affected the award;
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> (c) which, in the opinion of the Court, is of sufficient importance to merit such reference; and
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> (d) the determination of which by the Court raises, in the opinion of the Court, sufficient doubt to merit such reference.

It is plain that the discretion conferred on the Industrial Court is not an unfettered discretion but a limited one and in the exercise of its discretion, the Industrial Court must have regard to the four paragraphs enumerated therein.

Now, s. 33B(1) of the Act provides, *inter alia*, that "the decision of the (Industrial) Court to grant or not to grant an application under s. 33A(1) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court". It is common ground that such a clause will not have the effect of ousting the inherent supervisory power of the High Court to quash the decision by *certiorari* proceedings if the Industrial Court has acted without jurisdiction or in excess of the limits of its jurisdiction or if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. Authority for such a proposition is the Privy Council decision of the case of *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors.* [1980] 2 MLJ 165 and the House of Lords case of *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147. At p. 195 Lord Pearce said:

> Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged in a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

And at p. 171 Lord Reid said:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

In Award No. 14/82 the decision of the Industrial Court on service charge may be summarised thus:

> The Hotel shall retain 10% of the service charge collected monthly and shall distribute the remaining 90% to all the employees as prescribed in Appendix 'C'. The distribution of service points should be left to the Union.

We turn now to examine the reasons given by the Industrial Court for refusing to refer question (a) (i), (ii) and (iii) to the High Court. Question (a) (i) reads as follows:

Whether, having regard to the nature and character of service charges in law and also the provisions of the Industrial Relations Act, the Industrial Court was correct in law in limiting its distribution to only those employees listed in Appendix 'C'.

The Industrial Court dealt with this particular question in this manner and we quote:

The Company says that the Award is discriminatory in that it excludes 51 categories of employees of the Hotel from a share of the service charge. An Award on terms and conditions of employment is in fact in lieu of a collective agreement. It follows that the employees bound by an Award could only be employees who could be bound by a collective agreement. s. 9 of the Act excludes employees in managerial, executive, confidential and security capacities. The 51 categories of employees excluded by the Award belong to the s. 9 categories. As the exclusion is by law it cannot be said to be discriminatory. It may well be that it is desirable in the interests of productivity that the excluded employees be given incentives but that is not the concern of a collective agreement or award in lieu thereof. Be that as it may, we find that the question of discrimination did not arise during the course of the proceedings and we accordingly dismiss the application to refer Question (a) (i) to the High Court.

It is quite plain that the Industrial Court has misconceived its functions under s. 33A(1) of the Act and in *Rex v. Shoreditch Assessment Committee, Ex Parte Morgan* [1910] 2 KB 859 the Court of Appeal issued a *mandamus* because the committee had misconceived its duties. Farewell LJ said at p. 880:

No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure-such a tribunal would be autocratic, not limited - and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact.

It is also quite plain that the Industrial Court has failed to consider the question submitted to it and in *Board of Education v. Rice* [1911] AC 179 the House of Lords quashed the Board's decision and issued a *mandamus* on the ground that it had not determined the question committed to it by Parliament and at p. 182 Lord Loreburn LC said:

The board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by *mandamus* and *certiorari*.

Lastly, it is also quite plain that the Industrial Court has asked itself the wrong question when it dismissed the application to refer question (a) (i) to the High Court. In *Estate & Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* [1937] AC 898 the Privy Council issued a writ of prohibition holding that a housing authority had made a declaration beyond its statutory powers because it had in effect asked itself the wrong question. At p. 917 their Lordships said:

In other words, the respondents were applying a wrong and an inadmissible test in making the declaration and in deciding to subject it to the Governor in Council. They were therefore acting beyond their powers, and the declaration is not enforceable.

And in the case of *Maradana Mosque* [1967] 1 AC 13 the Privy Council held that the Minister of Education in Ceylon acted without or in excess of jurisdiction in that he asked himself the wrong question in deciding whether or not to make the order.

It follows that the Industrial Court rejected question (a) (i) on grounds which it had no right to take into account and that its decision was a nullity.

The second set of question (a) (ii) reads:

> Whether, having regard to the nature of service charges and also to the provisions of Industrial Relations Act, it is correct in law for the Industrial Court to abdicate jurisdiction or decline jurisdiction or decline to decide the distribution of service points amongst the employees concerned.

Dealing with this question the Industrial Court said:

> The Company says that the Court did not arbitrate in this case but instead either abdicated or declined jurisdiction when it said:
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> > We agree with the Union that the distribution of service points is best left to the Union ...
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> And Later
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> > In the instant case, the Union has devised a system of distribution of service points to its members working in the Hotel - a system which it considered fair and equitable and it will not be right for either the Hotel management or this Court to interfere.
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> > In our opinion, the Court was merely overstating its agreement with the views of the Union. The Court referred to Award No. 37/82 which emphasised the requirement of **mutual consent** in the distribution of service charge points. That Award is not an authority for the proposition that the distribution of service charge points should be left to the Union. Here, the Court was expressing the view that as the Union has a vested interest in keeping all its members happy it will not do anything to provoke the wrath of one section to please another and therefore, it was a reliable guide to accept the Union's proposals. We are satisfied that the Court in the present case did consider the arguments of both sides and came to an independent decision. We are further satisfied that it did not abdicate or decline jurisdiction.

In so holding the Industrial Court purported to adjudicate on the question which it has no power to do under the provisions of s. 33A(1) of the Act. It follows that the Industrial Court acted in excess of the limits of its jurisdiction or in the absence of jurisdiction and that its decision was a nullity.

Question (a)(iii) is in the following term:

> Whether it is correct in law for the Industrial Court to leave the question of distribution of service points entirely to the Union especially where there are many employees who are not members of the Union and thus not represented by it.

This is what the Industrial Court has to say on the question:

> In practical terms, no employee under the Award loses anything or takes home less income as all the employees have reached the maximum points. But new employees will not get as much as their predecessors. If the Company finds that this change has really affected their recruitment plans, then they should negotiate with the Union to vary the Award. We find that except for the extended graduated scheme of distribution of the employees' share of the service charge, the Award on service charge is consistent with the current practice in the hotel industry. For the reason we have stated we HOLD that no question on law arises for reference to the High Court in respect of questions Nos. (a) (ii) & (iii) and we accordingly DISMISS this part of the application.

In rejecting the application the Industrial Court seems to have taken the view that since the award on service charge is consistent with the current practice in the hotel industry no question of law arises for reference to the High Court. As Lord Alverstone CJ said at p. 1061 in the case of *R. v. Board of Education* [1909] 2 KB 1945, which was cited by Lord Pearce in *Anisminic* case *(supra)* at p.197:

> they (Board of Education) have not only not decided the question submitted to them, but have raised and made an order upon a matter never submitted to them ... or, in other words, they have given themselves jurisdiction to determine the question in favour of the local authority by changing the question submitted to them into the one which we have quoted.

It is quite plain therefore that the Industrial Court has not determined the question (a) (iii) which it is required to determine under s. 33A(1) of the Act. It follows that the decision of the Industrial Court was a nullity.

In the High Court the learned Judge appeared to have disposed of question (a) (i) and (iii) in this way:

> ... In view of the great importance which the Industrial Court placed on stability and uniformity in the hotel industry, it seems that the Industrial Court considers the questions of laws not of sufficient importance in the consideration of the dispute and hence not sufficient importance to merit reference to High Court although the Industrial Court did not state so in so many words. Therefore I hold that it was not wrong for the Industrial Court to refuse to refer the question to the High Court.

With regard to Question (a) (ii) this is how the learned Judge dealt with the matter and we quote:

> ... it appears to me that the Industrial Court did have a look at the system of distribution of service points devised by the Union and found it acceptable, and it is therefore not quite correct to say that the Industrial Court had declined jurisdiction. This seems to be another factor which supports the view that the questions are not of sufficient importance to merit reference to the High Court.

With respect to the learned Judge of the High Court, that was not the reason given by the Industrial Court in dismissing the application to refer question (a) (i), (ii) and (iii) to the High Court. If that were the real reason the Industrial Court would have said so in plain language.

We do not think that a proper approach had been adopted by the learned Judge of the High Court in dealing with the matter before him. In the exercise of its inherent supervisory jurisdiction over inferior tribunal of limited jurisdiction the High Court must always remember that it is not sitting as a Court of appeal to review the findings of the inferior tribunal. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit. Speaking of the inherent supervisory jurisdiction of the superior Court or High Court, Lord Sumner in the case of *Rex v. Nat Bell Liquors Ltd* [1922] AC 128 said at p. 156:

> That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

In our judgment, the learned Judge of the High Court appears to have misconceived his duty or function when he purported to substitute his own reason for that of the Industrial Court. This, with respect, he is not entitled to do. He has no power to alter or amend the

grounds of decision of the Industrial Court in the exercise of its inherent supervisory jurisdiction and was wrong in law to do so.

Since we have ruled that the decision of the Industrial Court dated 5 May 1982 relating to question (a) (i), (ii) and (iii) was a nullity within the principle enunciated in *South East Asia Fire Bricks* case (*supra*) and *Anisminic* case *(supra)* we hereby quash it. We also set aside that portion of the judgment of the High Court dealing with the same matter.

Next, it was submitted by learned Counsel for the Hotel that an order of *mandamus* should be issued directing the Industrial Court to refer the said question of law to the High Court for determination under s. 33A(1) of the Act. In our opinion, it is clear that we cannot grant an order of *mandamus* in that form inasmuch as it is rather unusual for the superior Court to direct an act to be done in a particular manner unless the act is purely a ministerial act *(Lord Alverstone CJ in R v. Licensing Justices on Kingston-on-Thames* [1901-02] 18 TLR 477. In this case, the Industrial Court is given a discretion albeit limited, whether or not to refer the question of law to the High Court and it is not right that the term of the order of *mandamus* should be in the form suggested by the learned Counsel which has the effect of depriving the Industrial Court in the exercise of its discretion. In our judgment, the proper form of the order of *mandamus* would be to direct the Industrial Court to hear and determine question (a) (i), (ii) and (iii) in accordance with the provisions of s. 33A(1) of the Industrial Relations Act 1967, and we so order.

There is one other matter which we would like to dispose of now. At the High Court the learned Judge referred to a passage in the judgment of the Privy Council in *South East Asia Fire Brick* case which reads:

> The reason for keeping questions remitted to the Industrial Court away from the ordinary Courts may be that its functions are not purely judicial. For example, the Industrial Court is directed by s. 27(4) (now s. 30(4)) of the Act 1967, in making its award in respect of trade dispute, to have regard to *inter alia* "the financial implication and effect of such award on the economy of the country, and on the industry concerned" and by sub-section (5) to 'act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form'.

The learned Judge seems to think that this passage may be relevant when the Industrial Court is considering para (c) of s. 33A(1) of the Act. It seems to us that the learned Judge has misapprehended the functions of the Industrial Court. Under this section the Industrial Court is not asked to deal with the question of law but to exercise its discretion whether or not to refer certain question of law to the High Court for a determination. Since the Industrial Court is not making an award under s. 33A(1) it follows that subsections (4) and (5) of s. 30 would not be germane to the matter in question and must therefore disregard these irrelevant collateral matters. In our judgment, the passage cited by the learned Judge is not relevant for the purpose of para (c) of s. 33A(1) of the Act. Parliament has conferred a discretion on the Industrial Court to be used to promote the policy and objects of the Industrial Relations Act 1967.

The appeal is therefore allowed with costs here and in the High Court below to be taxed. The deposit should be refunded to the appellant.

Also found at [1984] 2 CLJ 6